



THE MONTH IN WASHINGTON

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Throughout the month, speculation soared regarding whether the Joint Deficit Reduction Committee would reach agreement on a compromise package of proposals to achieve meaningful deficit reduction over the next ten year. The month ended with the committee leaders announcing an inability to bridge the committee's significant differences. In their statement they said, "We end this process united in our belief that the nation's fiscal crisis must be addressed and that we cannot leave it for the next generation to solve." "We remain hopeful that Congress can build on this committee's work and can find a way to tackle this issue in a way that works for the American people and our economy."

Also, the U.S. Supreme Court announced that it would consider specific questions regarding the Affordable Care Act prior to the 2012 elections. In addition to addressing the constitutionality of the individual mandate, the Court also said that it would review two procedural issues: whether other provisions in the ACA must be amended or repealed if the Court strikes down the individual mandate; and whether a final decision can be rendered on the individual mandate before 2014 when penalties for failure to purchase healthcare insurance will first be collected on IRS forms.

ISSUES AND EVENTS

Tavenner Will Get Nomination to Head CMS

President Obama plans to nominate Marilyn Tavenner to succeed Donald Berwick as administrator of the Centers for Medicare and Medicaid. Mr. Berwick is expected to step down from the post on December 2nd after failing to win enough support for confirmation. He was appointed by President Obama during the 2010 Congressional recess and has served almost two years in the post, but without confirmation would be required to leave the post by the end of the year. Marilyn Tavenner has been serving as his principal assistant deputy at CMS; together they have overseen the implementation of the Affordable Care Act. Tavenner will serve as interim administrator until her confirmation by the Senate Finance Committee.

Tavenner is a widely respected centrist Democrat who hails from the for-profit healthcare sector, having served in a variety of positions for Hospital Corporation of America. She began her career at HCA as a nurse, but climbed steadily from managing the nursing unit, to managing first one

and then ultimately a chain of hospitals, and finally the HCA's national ambulatory unit. Her experience on the front lines of medicine makes her a strong candidate – one who understands the challenges facing providers, and now the challenges facing the federal administration of the ACA.

A statement issued by the White House said, “Before entering government service, Ms. Tavenner spent nearly 35 years working with healthcare providers in significantly increasing levels of responsibility, including almost 20 years in nursing, 3 years as a hospital CEO and 10 years in various senior executive level positions for Hospital Corporation of America.”

Tom Scully, former head of the Federation of American Hospitals under George W. Bush said of her, “She’s just very smart, sharp, fair, organized. Unlike a lot of people in government, she actually had to run health care day to day for many years.”

After leaving HCA, she became Secretary of Health and Human Services for Virginia under Governor Tim Kaine. She has very strong knowledge of Medicare and Medicaid reimbursement policies. Despite her administrative obligations in overseeing the state’s Medicaid program during fiscally demanding times, she is known as a strong patient advocate, though she also has a reputation of being fiercely tenacious in implemented programs, regulations and policies.

D.C. Circuit Rules ACA Constitutional

Supporters of the Patient Protection and Affordable Care Act (ACA) hailed a ruling by the D.C. Court of Appeals that upheld a lower court’s ruling finding the healthcare reform law’s controversial ‘individual mandate’ is constitutional in a 2-1 decision. The individual mandate requires virtually all Americans to purchase health care insurance and imposes a financial penalty for failure to do so. There have been other legal challenges to the ACA, but the individual mandate has been the focus of the most seriously considered legal actions.

There have been three other circuit appellate court rulings on the constitutionality of the ACA during the past year in Atlanta, Richmond and Cincinnati. Two of those rulings upheld the constitutionality of the ACA, while one ruled the individual mandate unconstitutional without invalidating the remainder of the law. One other suit was dismissed on a technicality, the court in that case ruling the plaintiff did not qualify to file suit. One appellate court decision upholding the ACA struck down a tax related challenge to the law because the complainant would not actually have to pay the penalty for refusing to purchase health insurance until the law takes full effect in 2015; the court said no infringement has yet occurred and so dismissed the suit.

ACA supporters were especially encouraged to note in this case that a conservative jurist appointed by President Ronald Reagan, Judge Laurence H. Silberman, wrote the opinion. Judge Silberman wrote that the Commerce Clause, used to support the individual mandate, allows Congress to regulate commerce even if not all people are active in that market. “No Supreme Court case has ever held or implied that Congress’s Commerce Clause authority is limited to individuals who are presently engaging in an activity involving, or substantially affecting, interstate commerce,” he wrote.

Stephanie Cutter, a Presidential adviser released a statement that said in part, “People who make a decision to forego health insurance do not opt out of the health care market. Their action is not felt by themselves alone.” The crux of the argument for supporters is that virtually all Americans will require health care treatment at some point (s) in their lives and therefore should be required to participate in supporting the health care delivery system.

Detractors of the health reform law claim they should not be forced to make a purchase they don't want to make, and should not be "taxed" for a product they do not buy. The case the appeals court decided was brought by four individuals who are supported by a conservative religious legal group, the American Center for Law and Justice.

"Today's decision reinforces the fact that the courts are split about this flawed health care law," the center said in a statement. "As we determine our next course of action — whether to ask the full appeals court to hear the case - or directly ask the Supreme Court to take the case — we still remain confident that ObamaCare and the individual mandate, which forces Americans to purchase health insurance, is the wrong prescription for America and ultimately will be struck down as unconstitutional by the U.S. Supreme Court."

The U.S. Supreme Court has announced plans to consider questions related to the ACA during its current term.

California Medicaid Fraud Case Raises Issues in Senate Judiciary Committee

A Medicaid fraud case in California that recently settled for \$241 million involved allegations that a medical laboratory had overcharged the state's insurance program as part of paying kickbacks to doctors and hospitals that referred patients to its labs. Now, Senate Finance Committee Chairman Max Baucus (D-MT) and Senate Judiciary Committee Ranking Member Chuck Grassley (R-IA) want to know more about a practice where insurers receive discounted pricing from testing labs in exchange for referrals – including testing for Medicare beneficiaries.

In letters sent to three major health insurance companies and two leading clinical testing laboratories, the Senators noted that the Inspector General for the Department of Health and Human Services previously has issued advisory opinions expressing concerns about what's called "pull through". They called such discount arrangements "particularly suspect."

Baucus and Grassley asked Cigna, Laboratory Corporation of America, Aetna, Inc., UnitedHealth Group Inc., and Quest Diagnostics Incorporated for copies of lab service agreements, correspondence related to negotiation of the contracts, presentations to boards about contracts, presentations to clinical laboratory testing providers, and other documents related to pull-through practices, including those provided in response to subpoenas from attorneys general.

As part of their oversight responsibilities, the two senators last month released a report detailing accusations of how home health companies have defrauded Medicare. Waste, fraud and abuse are key areas the government agency is focusing on to save money for the strapped public medical care programs Medicare and Medicaid.

The Senators wrote, "...we take seriously our responsibility to protect the interests of our nation's Medicare and Medicaid beneficiaries and the federal health care programs from waste, fraud, and abuse." They provided a list of ten types of documents they want submitted to the oversight committee by December 1st.

SEC Releases New Reports on International Financial Reporting Standards

The SEC continues to make progress in their efforts to develop a single set of high quality global accounting standards with the release of two additional staff reports.

One of the reports identifies differences between US Generally Accepted Accounting Standards (US GAAP) and International Financial Reporting Standards (IFRS). The other provides insights as to how IFRS currently work in practice. Both reports are milestones that were outlined in the SEC's work plan on converging US GAAP and IFRS issued in February 2010.

The comparison document discussed the staff's analysis of 29 accounting areas, including accounting treatment related to accounting changes and error corrections, which frequently surfaces when a company restates its financials for a previous period. Other areas of comparison included earnings per share, interim reporting, and accounting for risks and uncertainties. The staff was careful to note their review was performed at a high level and was not intended to be a comprehensive examination of all the differences between US GAAP and IFRS.

The report suggests there are many fundamental differences between US GAAP and IFRS, despite the coordination between the Financial Accounting Standards Board (FASB), which issues US GAAP, and the International Accounting Standards Board (IASB), which issues IFRS.

The other report, which reviewed how IFRS works in practice, was similarly high-level. Staff indicated that they reviewed audited financial statements by 183 companies that reported their financial conditions using IFRS. Both US issuers and non-US companies were evaluated. Generally speaking, the staff found most of the companies' statements appeared to comply with IFRS. Still, the staff found that IFRS were not uniformly applied from country to country.

The staff papers are expected to inform the Commissioners about whether and how to converge the standards. The 2010 work plan suggested the SEC would make a determination about incorporating IFRS into the US financial reporting model by the end of 2011.

CLASS Act II

AARP has joined a group of more than 50 disability rights groups across the nation in sending letters to House and Senate leaders urging them not to repeal CLASS Act from the Affordable Care Act (ACA). The Community Living Assistance Support and Services Act was supposed to have provided a national public long-term care option, but was shelved in October by HHS Secretary Kathleen Sebelius after that agency could not produce evidence the program was self-sustaining, which was a requirement of its implementation.

A copy of the letter sent to House Speaker John Boehner (R-KY) and Minority Leader Nancy Pelosi (D-CA) said in part, "Medicare does not cover long-term services and supports (LTSS), yet about 70 percent of people over age 65 will require some type of LTSS at some point during their lifetime. As our population ages, the need for these services will only grow."

Republicans have expressed suspicion that some in the administration knew the program was not financially viable, but understanding that its inclusion was critical to the passage of the ACA, they did not want to accept or deliver that news. The GOP has vowed to repeal CLASS to ensure it cannot be resuscitated – a move Democrats and long-term care advocates fear will weaken the ACA's chances of survival. CLASS supporters would prefer to keep the law inactive, rather than removed, hoping some new means will be found to revive it.

The advocates wrote: "Rather than repeal CLASS, we urge continued dialogue and development of a viable path forward. The need to address LTSS and how these services will be paid for in a way that is affordable to individuals and society as a whole will not go away."

On Wednesday, November 30th, the House Energy and Commerce Committee voted 33-17 to repeal the CLASS Act, setting up a possible vote by the full House by year's end. It's highly unlikely that any House passed repeal bill would be considered by the Senate.

Enzi Blasts HHS Over GAO Report on Early Retiree Insurance Program

Senate Health, Education, Labor & Pension Committee Ranking Member Michael Enzi (R-WY) has strongly criticized the Health and Human Services agency for its distribution of funds to support the Early Retiree Reinsurance Program (ERRI). The ERRI is part of the Affordable Care Act (ACA) and was intended to offset the cost of purchasing insurance for those over 55, but who do not yet qualify for Medicare. Enzi's remarks came after a GAO report revealed that the majority of money, about \$1.5 billion went to just 24 recipient sponsors.

Enzi's statement said in part, "More than half of the funding went to government entities, including state employee retiree health plans. And of the remaining funds, most of it went to union health plans." He expressed anger that the program is set to expire in 2012 due to lack of funding, despite being scheduled to run through 2014, and also that most of the funding was directed to health plans serving auto and state worker unions.

"Rather than rewarding politically connected constituencies, the remaining funds in the insurance program for early retirees should be used to assist employers with providing insurance coverage," Senator Enzi said. "If that proves impossible, the funds should be returned to the Treasury to reduce the federal deficit."

House Subcommittee Approves Bills to Requiring More Cost-Benefit Analysis by SEC, Exempting ERISA Pension Plans from Dodd-Frank Provision

The U.S. Securities Exchange Commission (SEC) will be required to conduct a cost-benefit analysis before issuing new regulations and then must assess the impact of regulations after they have been adopted, under a bill approved by a House subcommittee.

The Capital Markets Subcommittee approved the SEC Regulatory Accountability Act on a party line vote of 19-15. According to the bill's sponsor, Chairman Scott Garrett (R-NJ), the measure is tailored after an executive order by President Obama that would require all cabinet agencies to conduct cost-benefit reviews prior to issuing new regulations. Since the SEC is an independent agency outside of the cabinet structure, explained Garrett, the President's executive order would not apply to it.

Opponents of the bill countered that the bill imposes additional hurdles for SEC rulemaking that are duplicative to current Securities Exchange Act rule 3(f), which requires the SEC to consider "whether an action is necessary or appropriate in the public interest." This provision has been interpreted as requiring a cost-benefit analysis for SEC rules. Opponents further argued that the outcome in a recent DC Circuit Court case (*BRT v SEC*) supports that position.

"At a time SEC budgets are being slashed to point that they have expressed that they won't be able to fully implement the Dodd-Frank, [this legislation] would require significantly more resources for economic analysis before rulemaking can be issued," Rep. Carolyn Maloney (D-NY) said. "And we have seen with the DC Circuit's review of the proxy access rules, that a court can go in and tell the SEC to do more cost-benefit analysis now."

The Subcommittee also adopted legislation that would exempt ERISA pension plans from certain requirements of Dodd-Frank when engaging in swaps transactions. Proponents of the bill argued

that the legislation removes a provision of Dodd-Frank that inappropriately created a fiduciary duty between a swaps dealer and its pension plan client.

“The goal of this bill is to allow a security-based swap dealer to enter into a swap transaction with a pension plan,” Garrett stated, “without triggering a fiduciary liability under ERISA.”

Rep. Maxine Waters (D-CA) noted that the so-called business conduct standards would be included in Dodd-Frank, because some “relatively unsophisticated investors were being exploited in the swaps markets” leading up to the financial crisis of 2008. She used as an example Jefferson County, Alabama, which recently filed for bankruptcy protection due to financial woes that stemmed from a series of swaps transactions it made to finance a new sewer system.

Waters said that concerns about creating a fiduciary standard were being understated. She noted that congress rejected efforts to create such a standard in Dodd-Frank and indicated that the SEC and CFTC were working with stakeholders, including CalPERS, to find a workable solution to implementation challenges.

Both bills are expected to move through the full House Financial Services Committee in the next few months.

CFTC Gets Boost from Coalition of Public Pension Plans

CalPERS and public pension plans from Colorado, Missouri, Texas and Wisconsin recently wrote the CFTC to applaud the agency’s work in crafting rules required by the 2011 landmark financial reform legislation and requested the Commission include provisions affecting the plans in a “phased implementation rule.”

The plans submitted a comment letter related to a CFTC proposed rule that laid out a schedule for market participants to comply with swaps documentation requirements and requested comment on whether the schedule should be expanded to other regulations.

“We applaud the Commission for recognizing that ‘requiring immediate compliance with the new requirements could indirectly impose costs on market participants’ and we support a phased compliance schedule that would give certain entities ‘adequate time to modify or create the requisite documentation,’” the group of plans wrote the CFTC.

The plans noted that documentation requirements of the business conduct standards, currently being developed by the agency, are closely tied to other documentation requirements and should be implemented together.

The coalition requested public plans have one year to comply with final rules issued by the Commission.

RELATED NATIONAL AND INDUSTRY NEWS

National Association of Insurance Legislators Joins Opposition to PEPTA Legislation

The National Conference of Insurance Legislators (NCOIL), an organization of state legislators whose main area of public policy concern is insurance legislation and regulation, endorsed a resolution opposing the Public Employee Pension Transparency Act (PEPTA).

In a statement issued following adoption of the resolution, conference leaders said, “NCOIL legislators are proud to join our state and local government colleagues in opposing PEPTA. The bill’s big brother undertones are too much for those of us that have worked hard in the states to protect the retirement security of our constituents and to make sure hard-earned taxpayer dollars are used wisely. We do not need the distant federal government to insert itself into state and local pension plan decisions.”

The NCOIL resolution opposes PEPTA (H.R. 567/S. 347) and calls on Congress to let state and local officials manage their own unique pension systems. Among other things, the resolution argues that PEPTA would unnecessarily inject the federal government into the administration of state and local pension plans and would threaten funding for state and local government projects by conditioning continued tax benefits.

NIRS Report Links DB Pensions with Teacher Retention, Productivity

A new study released by the National Institute of Retirement Security revealed that defined benefit pensions play a critical role in retention and performance of teachers. Among the study’s key findings are that teacher effectiveness increases with experience and productivity increases with stability; that replacing teachers is very expensive thereby making retention a key cost control; and that DB plans help schools recruit higher quality teachers.

CALIFORNIA CONGRESSIONAL DELEGATION NEWS

California Congressional Leaders Mulling Shift to ‘Chained Price Index’

House Minority Leader Nancy Pelosi and senior Ways and Means Democrat Xavier Becerra both expressed at least tacit approval for possible changes in Social Security as the Joint Deficit Reduction Committee attempted to reach an agreement prior to its November 23rd deadline. A proposal to shift SS actuarial computations for cost of living increases to a “chained price index”, or CPI, was reportedly under consideration.

Seniors’ advocates like AARP have clearly stated their opposition to such a change as it tends to result in slightly lower COLA adjustments. Both California legislators previously have spoken against the idea. “Don’t make Social Security, which hasn’t added a single cent to these deficits, pay for this deficit reduction,” Becerra said on July 29.

Also back in July, Pelosi said, “We must protect Medicare and Social Security. We will not support cuts.”

But Becerra was a member of the Super Committee charged with finding \$1.2 trillion in budget savings over the next 10 years, and his comments suggest he might have been amenable to this particular change provided other protections are either created or kept.

As the deadline approached, Pelosi echoed that sensibility. When asked about her position on the matter she said, “Let’s just see a package. Let’s not exclude anything. Let’s just see how they come; everybody recognizes the balance that we need to have.” She also said, “It is everybody’s understanding that we have to yield on certain points when we see the urgency of doing so.”

The CPI calculates the price of goods in a way that accounts for changes in spending when commodities prices rise; for example, consumers will purchase oranges as a substitute for more

expensive apples. Economists tend to agree the CPI calculation provides a more accurate reflection of how inflation impacts consumers. Social Security and seniors' advocates claim it does not account for the fundamental differences in *what* seniors purchase. Seniors spend more money on health care than housing, making the CPI less accurate for their demographic, they say – the very demographic that most needs assistance in cost of living increases.

In perhaps the oddest of embraces, anti-tax advocate Grover Norquist joined AARP in lobbying against the CPI, because it also affects taxes. A slower growing inflation rate (as calculated by the CPI) would mean more people are put in a higher tax bracket. According to the CBO, a chained CPI would raise \$72 billion over a decade in new tax revenue.

California Congressman Leads Effort to Curb Executive Prerogative

The House Rules Committee, chaired by California Congressman David Dreier, voted 7-3 along party lines to approve legislation that would require Congress to ratify by joint resolution any federal agency rules that would cost \$100 million or more, or that would have “adverse effects” on business or consumer prices.

Chairman Dreier, said, “This is a measure that is designed for us to play a more vigorous role in oversight.”

Currently, Congress can repeal executive orders only by a joint resolution of disapproval, but conservative lawmakers have become frustrated with the Obama administration's perceived reliance on executive orders to accomplish administration objectives.

Dreier said, “Many of these regulations have played a role in undermining opportunities for job creators to do what needs to be done” to strengthen the U.S. economy, he said.

The bill has 199 co-sponsors, only one of whom is a Democrat, Dan Boren of Oklahoma. The House Judiciary Committee, which has jurisdiction over the bill, advanced its proposal on a party line vote in October. Senator Rand Paul (R-KY) has introduced a companion bill in the Senate.

Democrats tried to take some teeth out of the bill by offering amendments that would exempt any potential implementation for areas of policy affecting nutrition, healthcare, public safety and job growth, but Republicans persevered to reject all amendments.